



4. Respondent was approved for FS benefits in Wisconsin for the period of March 6, 2013 – August 31, 2013.
5. On September 18, 2012 and April 17, 2013, Petitioner submitted applications for SNAP benefits to the State of Mississippi. She reported an address in Mississippi. The benefit issuance history for the respondent and her household from the State of Mississippi indicates the respondent received food benefits from Mississippi for the period of August, 2012 – September, 2013.
6. In September, 2013, the Wisconsin agency established an overpayment against the respondent for the overissuance of FS benefits. The respondent filed an untimely appeal of the overpayment action. In June, 2014, the respondent received a tax intercept notice from the State of Wisconsin as part of the state's collection action against the respondent for the FS overissuance. The respondent filed an untimely appeal of the tax intercept action. See DHA Case No. FTI/158476.
7. On October 20, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent provided false information in order to receive SNAP/FS benefits.

### DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The evidence establishes that the respondent was living in Mississippi and using her benefits in Mississippi at the same time that benefits were being used in Wisconsin. Clearly, the respondent cannot be in both states on the same days. The agency concedes that the evidence shows that the respondent was likely living in Mississippi during the relevant time periods and was not using the Wisconsin benefits. Someone else was using the Wisconsin card issued under the respondent’s name and was using the benefits on the card in Wisconsin.

The agency offered to withdraw its action against the respondent if she filed a police report for identity theft. The respondent did not file any report. At the hearing, the respondent testified that she still has not filed any report and gave no reasonable explanation for not doing so. She testified that she believes her cousin may have been the person who applied for and received benefits in her (the respondent’s) name. The respondent was again offered the opportunity to file a police report and advised that if she did so prior to the issuance of a decision, the agency would likely withdraw its action against her. The respondent provided no evidence, to date, that she filed a police report.

Though there is no evidence that the respondent was actually receiving the benefits from Wisconsin, the fact is that benefits were issued in her name at the same time in two different states. That the respondent refuses to file a police report lends credibility to the agency argument that the respondent was either in collusion with someone in Wisconsin or, at least, was allowing someone to use her identity to obtain benefits with her knowledge. Based on the evidence that duplicate benefits were being issued in her name in two states, I conclude the agency has met its burden of demonstrating that the respondent committed and intended to commit an intentional program violation.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation

committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for ten years.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rules specifying that individuals may not receive duplicate SNAP/FS benefits and must provide accurate and truthful information.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE**, it is

**ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for ten years, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 5th day of 2015, 2015.

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
Megan Ryan - email





## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 5, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
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